

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

**RESOLUTION No. R2-2002-0106**

AUTHORIZING THE EXECUTIVE OFFICER TO ENTER INTO AN AGREEMENT FOR MUTUAL RELEASE AND COVENANT NOT TO SUE WITH MER SOLEIL, LLC, FOR THE FORMER VILLA CLEANERS SITE, 36565 NEWARK BOULEVARD, NEWARK, ALAMEDA COUNTY

WHEREAS, the California Regional Water Quality Control Board, San Francisco Bay Region (the Board) finds that:

1. **Jurisdiction:** The proposed 4.9-acre site (Property) is located in Newark, Alameda County, and is bounded by Newark Boulevard to the east, Mayhews Landing to the south, and commercial and residential property to the north and west. Site details are shown in Attachment 2. The Board is the lead agency because of the concerns related to groundwater quality at this site.
2. **Summary of Investigation and Remediation Activities:** The Property was formerly occupied by a commercial/retail complex that included Villa Cleaners, a dry cleaning operation. Impacts to soil and groundwater by tetrachloroethylene (PCE), a dry cleaning solvent, and related breakdown products were first identified in 1996. Board Order 00-65 required subsurface investigations to define the extent of the soil and groundwater contamination. Final, approved remedial actions are presented in the January 2002 reports *Proposed Remedial Actions and Cleanup Standards* and *Longterm Risk Management Plan for Residual Subsurface VOC Contamination* (including February 2002 update). These reports were submitted to fulfill Task 5 of Board Order 00-65.

Impacted soil underlying the former dry cleaner was excavated, treated on-site and used as backfill material. Residual concentrations of PCE in soil across the site are below the residential cleanup goal established for the site of 0.80 mg/kg.

A small, isolated area of impacted groundwater is present beneath the Property in the immediate vicinity of the former dry cleaner and situated approximately 15 feet below ground surface. Monitoring data indicate that the plume is confined to a clayey silt unit in the immediate area of the former dry cleaner and is not likely to migrate offsite at levels of significant concern. Testing has shown that deeper aquifers have not been impacted. The presence of trichloroethene and cis 1,2 dichloroethene in groundwater indicate that natural attenuation and breakdown of PCE is occurring.

An environmental risk assessment concluded that residual impacts do not pose a significant risk to human health and the environment, provided that groundwater is not used as a source of drinking water and provided that structures are not built over areas underlain by impacted groundwater where the clayey soil substrata has been significantly disturbed. Board staff requested that a deed restriction be prepared that prohibits the installation of groundwater supply wells on the Property and prohibits

disturbance of soil at depths greater than five feet in areas where structures for human occupancy are to be constructed over groundwater with residual impacts. Affected areas of the property are described in the February 2002 *Long-Term Risk Management Plan*.

Borings and wells have indicated that a regional aquitard, the Yerba Buena Mud, separates the shallow, contaminated groundwater from the underlying Newark aquifer. A temporary well was installed in the aquifer. Analysis of groundwater samples from the well indicated that the aquifer has not been impacted by the release. A search of State and County records was performed to locate any wells that could act as conduits for vertical migration of the shallow water contamination to the deeper aquifer. No wells were identified in the immediate vicinity of the Property.

3. **Proposed Redevelopment:** The Property has been divided into 33 individual lots. Mer Soleil, LLC, proposes to redevelop the lots with single-family homes.
4. **Mer Soleil, LLC's Request:** Mer Soleil, LLC, seeks a commitment from the Board that Mer Soleil, LLC, and its successors in interest will not be named as dischargers (or responsible parties) in a Board enforcement order with regard to known conditions of contamination solely by virtue of being the current property owner of the Property. Specifically, Mer Soleil, LLC, requests that the Board issue a Mutual Release and Covenant Not to Sue (Mutual Release) to Mer Soleil, LLC, subsequent purchasers, and related parties for the Property relative to known conditions. Mer Soleil, LLC, has purchased the Property and initiated redevelopment under good faith that the Board will issue a mutual release.
5. **Future Activities:** As a condition of the Mutual Release, Mer Soleil, LLC, will submit quarterly groundwater monitoring reports for the Property for a period of up to three years following approval of this PPA, should the Kaimayee Trust fail to comply with monitoring requirements as set forth under Board Order 00-65 and the approved RAP.
6. **Deed Restriction:** As a condition of the Mutual Release, Mer Soleil, LLC, has agreed to execute and record a deed restriction that prescribes limitations on future redevelopment of the Property, as detailed in the tasks presented in the Mutual Release and Covenant Not to Sue. Adherence to such deed restriction is a condition for the continued benefits conferred by the Mutual Release and Covenant Not to Sue.
7. **Board Authority:** Pursuant to the Board's statutory authority, the Board can enter into agreements whereby the Board covenants not to name prospective purchasers, tenants, or lenders in enforcement actions for remediation of polluted properties if such agreements are sufficiently in the public interest to warrant expending public resources necessary to reach such an agreement.
8. **Benefits of Redevelopment:** Benefits to the community include the provision of additional homes for the City of Newark and productive use a previously blighted property in the community. In addition, annual property tax revenue to the local municipality will increase from the added housing, with additional incremental sales tax

from added resident patronage of nearby retail operations. Additional environmental benefit is to be provided from continued monitoring of residual groundwater impacts and assurance that future redevelopment of the Property does not pose an adverse risk to human health.

9. **CEQA:** The purchase of the parcel is not an activity that requires the Board's approval and, therefore, does not constitute a "project" as defined by Public Resources Code Section 21065 and 14 CRR 15378(a). Thus, the activity is exempt from CEQA.
10. **Public Notice:** The Board provided notice of its intention to consider this matter at the October 16, 2002, Board meeting and provided an opportunity for interested persons to comment on the draft resolution and its attachments.
11. **Public Hearing:** The Board, in a public meeting, heard and considered all comments pertaining to this matter.

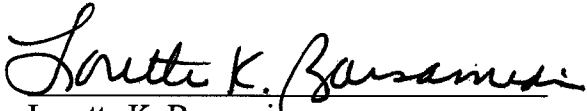
**NOW, THEREFORE BE IT RESOLVED,** that the Board authorizes the Executive Officer to sign the Mutual Release and Covenant Not to Sue (Attachment 1).

Attachment 1: Mutual Release and Covenant Not to Sue

Attachment 2: Legal Description of Parcel

Attachment 3: Transfer Document

I, Loretta K. Barsamian, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on October 16, 2002.

  
Loretta K. Barsamian  
Executive Officer

**ATTACHMENT 1**

**MUTUAL RELEASE AND  
COVENANT NOT TO SUE**

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

**ATTACHMENT 1 TO RESOLUTION**

**MUTUAL RELEASE AND COVENANT NOT TO SUE  
FOR 36565 NEWARK BOULEVARD, NEWARK, CALIFORNIA**

**I. INTRODUCTION**

THIS MUTUAL RELEASE AND COVENANT NOT TO SUE (the "Mutual Release") is provided in response to a request by Mer Soleil LLC, a California limited liability company (the "LLC") and pursuant to San Francisco Bay Regional Water Quality Control Board ("Regional Board") Resolution No. R2-2002-0106 ("Resolution") authorizing its Executive Officer to negotiate and sign the Mutual Release concerning the real property located at 36565 Newark Boulevard in Newark, California, which consists of approximately 4.9 acres and which is more particularly described in Attachment 2 to the Resolution (the "Property") and which the LLC will develop for residential uses. This Mutual Release is consistent with the State Water Resources Control Board ("State Board") Executive Director's memorandum dated July 9, 1996, regarding prospective purchaser agreements.

The Regional Board understands that the LLC has recently purchased this Property, which the LLC will develop for residential uses. The LLC desires a commitment, to the maximum extent permitted by law, that it, subsequent purchasers, tenants, lenders, and any occupants of the Property, as well as all of their respective directors, officers, shareholders, employees, partners, members, agents, "LLC Affiliates", successors, and assigns (individually a "Released Party" and collectively the "Released Parties") and their respective successors in interest will not be subject to liability for, or the subject of any actions, claims, orders, demands, enforcement actions or other civil or administrative proceedings, including without limitation, any investigation, monitoring or remediation requirements, related to or arising from the Known Conditions as of the date this Mutual Release is fully executed ("Effective Date"). "LLC Affiliates" are any entities controlling, controlled by, or under common control with the purchaser, LLC, and include, without limitation, Santa Clara Development Company, Robson Properties, Inc., Robson Communities, Inc., and Sun Lakes Construction Company of California.

**II. DEFINITIONS**

For purposes of this Mutual Release, "Known Conditions" means all conditions of pollution at, under, or originating from the Property or any portion thereof, that were known to the Regional Board prior to the Effective Date. The phrase "known to the Regional Board" refers to information regarding hazardous substances, including the volatile organic compounds (VOCs), petroleum fuel releases, and other pollution at, under, or originating from the Property, or any portion thereof, that was disclosed to the Regional Board or is reasonably discernible from the reports noted in the Resolution, or the investigations, workplans, reports, or any other

information submitted to the Regional Board prior to the Effective Date. With respect to any claim, cause of action, investigation, or enforcement action asserted or required by the Regional Board, the Released Parties shall bear the burden of proving that any condition of pollution at, under, or originating from the Property is a Known Condition.

### **III. FINDINGS OF FACT**

1. The Property is within the jurisdiction of the Regional Board due to the Known Conditions. The Regional Board enters into this Mutual Release pursuant to California Water Code Sections 13300, et seq. The Regional Board has authority to release and covenant not to sue or assert claims for environmental investigation or remediation or other related claims against prospective or actual purchasers of environmentally impacted properties, where, as here, the agreement is sufficiently in the public interest.
2. The Property is the former site of a strip shopping center. The known or potential dischargers within the Property include a former dry cleaner located within the shopping center. The previous owner of the Property is the Kaimayee Trust.
3. Various investigative and remedial activities have been undertaken on the Property and significant amounts of impacted soil at the Property was excavated and treated to approved cleanup standards.
4. The Regional Board did not name the LLC as a responsible party. The LLC is not affiliated with any responsible party for the Known Conditions. The sole interest of the LLC in the Property has been to purchase and redevelop the Property for residential uses.
5. The LLC plans to develop the Property to a productive use that will benefit the public and the community. Benefits include redevelopment of vacant property in a prominent location and provision of additional single family housing, consistent with the City of Newark's local land use plans.
6. This Mutual Release is consistent with the goals and purposes of the Porter-Cologne Act and the Federal Clean Water Act.
7. The Construction Risk Management Plan For Residual, Subsurface VOC Contamination, Tract 7004, Lots 7-15 & Adjacent Dijon Drive, Newark California (Former Villa Cleaners, 36565 Newark Boulevard), dated January 2002 (the "Construction Risk Management Plan"), addresses current Known Conditions such that residential development of the Property will avoid adverse environmental or human health consequences. The Covenant and Environmental Restriction on Property to be recorded against Lots 7 through 15 of the Property, and the Longterm Risk Management Plan For Residual, Subsurface VOC Contamination, Tract 7004, Lots 7-15, Newark, California (Former Villa Cleaners, 36565 Newark Blvd.), dated February 2002 (the "Longterm Risk

Management Plan”), which is incorporated into the Covenant and Environmental Restriction on Property, address current Known Conditions such that future residential activities will avoid adverse environmental or human health consequences. No activities at the Property that are in compliance with the Construction Risk Management Plan and the Longterm Risk Management Plan will aggravate, contribute to, or create a condition of, pollution as a result of the Known Conditions. Any activities conducted by the LLC and its successors and assigns at the Property must be in compliance with the requirements of law.

#### **IV. AGREEMENT**

In consideration of the LLC’s agreement to complete all tasks identified below and in accordance with the Resolution, and the findings of the Regional Board staff, the Regional Board expressly finds that the Released Parties shall not be liable or otherwise, responsible for such Known Conditions and hereby covenants and agrees not to initiate, bring, or support any claim, order, demand, enforcement action or other civil or administrative proceeding against the Released Parties arising out of or related to such Known Conditions under any local, state or federal statute or the common law, including but not limited to, in their entirety, the United States Code, the various California Codes, or other applicable laws, regulations, ordinances, or civil, judicial or administrative authorities, having application to the handling, release, presence, migration, investigation, monitoring, cleanup, containment or maintenance of the Known Conditions at, on, under or originating from the Property, or any portion thereof. This Mutual Release shall inure to the benefit of, and pass with each and every portion of the Property, and shall benefit any respective successors and assignees of the Released Parties, unless such successors and assignees caused or contributed to the Known Conditions.

This mutual release shall remain effective notwithstanding the revocation or modification of Resolution No. R2-2002-0106 and shall be without prejudice to the ability of the Regional Board to take action against any party other than the Released Parties, relating to the investigation, cleanup, or cost of investigation or cleanup of the Known Conditions.

Notwithstanding any other provisions of this Mutual Release, the Regional Board reserves the right to assert any claims, enforcement actions or other civil or administrative proceedings against the respective Released Parties relating to the acts or omissions of the Released Parties arising after the Effective Date and which are based on the failure of the respective Released Parties, to the extent they have control over the Property, to (i) exercise due care at the Property with respect to the Known Conditions, (ii) comply with the requirements and conditions of this Mutual Release, and (iii) comply with any deed restrictions and/or institutional constraints currently imposed or that the Regional Board may subsequently impose (with regard to limitations upon the extraction of groundwater and excavation or soil disturbance at the Property). If a Released Party has failed to comply with any of these three enumerated requirements, and the Regional Board elects to proceed against that Released Party, then this Mutual Release shall be null and void as to that Released Party, and the Regional Board and the Released Party shall then have any rights or defenses they would have had if this Mutual Release and Covenant Not to Sue had not existed.

This reservation by the Regional Board shall be separately and distinctly applied with respect to each of the Released Parties, the intent being that failure by a particular Released Party to comply with any applicable requirement shall not render the Regional Board's covenant inapplicable to any other Released Party. Nothing contained in this Mutual Release shall be deemed a waiver of, or a release by, any Released Party of any defense, cross-claim, counter claim, offset or other rights available to such Released Party in response to any claim, order, demand, enforcement action or other civil or administrative proceeding by the Regional Board, as specifically reserved hereunder.

In partial consideration for this Mutual Release, the Released Parties, on behalf of themselves and their respective successors in interest, (1) hereby release and covenant not to sue the Regional Board, its authorized officers, employees or representatives, with respect to any and all liability or claims associated with or arising out of the Known Conditions, and (2) agree to complete the following tasks:

- 1) Sign and record a deed restriction acceptable to the Executive Officer and pursuant to Civil Code section 1471 that incorporates a Long-Term Risk Management Plan for residual impacts at the site and includes the following provisions:
  - Prohibition against the installation of groundwater supply wells;
  - Prohibition against excavation or augering activities extending beyond a depth of five (5) feet below ground surface in areas of impacted groundwater where structures for human occupancy are to be located;
- 2) Submit quarterly groundwater monitoring reports for the Property for a period of up to three years following approval of this Mutual Release, should the Kaimayee Trust fail to comply with monitoring requirements as set forth under Board Order 00-65 and the approved RAP.

This Mutual Release shall be in full force and effect from the Effective Date. Mer Soleil LLC shall have ninety (90) days from the Effective Date of this Mutual Release to provide a recorded copy the deed restriction to the Board. If Mer Soleil LLC fails to record the deed restriction within the time frame set forth above, which may be extended by the Board or the Executive Officer at its discretion, this Mutual Release shall automatically terminate.

The Mutual Release shall not prohibit the Board from asserting any claim against the released parties, enforcement action or other civil or administrative proceeding related to any condition of pollution at, under or originating from the Property prior to or after the Effective Date that are not arising from or related to the Known Conditions.

The LLC shall record this Mutual Release in the County of Alameda within thirty (30) days of the date hereof. A copy of the recording shall be provided to the Board within ten (10) days of the recording.

This Mutual Release may be executed in one or more counterparts, each such counterpart being deemed an original but all counterparts constituting a single instrument.



Execution of this Mutual Release by the undersigned parties shall make the Mutual Release effective and shall confer the benefits of the Mutual Release upon all Released Parties, except as otherwise specified herein.

Each of the undersigned parties hereby certifies, and warrants that he or she is authorized to bind his or her agency or entity to the continuing obligations described herein, and that the foregoing is a full, true and correct copy of Attachment 1 to Resolution No. R2-2002-0106, Mutual Release and Covenant Not to Sue adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on October 16, 2002, 2002.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

By: \_\_\_\_\_  
Loretta K. Barsamian, Executive Officer

Date: \_\_\_\_\_

ATTEST:

STATE OF \_\_\_\_\_ )  
 ) S.S.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, before me, \_\_\_\_\_, a notary public in and for such County and State, personally appeared \_\_\_\_\_ and \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument, the person(s) or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public

MER SOLEIL LLC,  
a California limited  
liability company

By: Robson Properties, Inc., a California  
corporation, its Manager

By: \_\_\_\_\_  
Mark E. Robson, President

Date: \_\_\_\_\_

ATTEST:

STATE OF \_\_\_\_\_ )  
 ) S.S.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, before me, \_\_\_\_\_, a notary public in and  
for such County and State, personally appeared \_\_\_\_\_ and  
\_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory  
evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged  
to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their  
signature(s) on the instrument, the person(s) or entity upon behalf of which the person(s) acted, executed  
the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public

**ATTACHMENT 2**  
**LEGAL DESCRIPTION OF PARCEL**

**California Regional Water Quality Control Board  
San Francisco Bay Region**

**Attachment 2 to Resolution No. R2-2002-0106**

**Legal Description of the Property in the City of Newark**

The land referred to in Resolution R2-2002-0106, this Attachment 2, and in other Attachments consists of property situated in the State of California, County of Alameda, City of Newark, and is more particularly described as follows:

Lots 1 through 33, of Tract 7004, filed April 9, 2002, at Map Book 263, Pages 71-72, Alameda County Records, and all streets and other parcels in such Tract.

ASSESSOR'S PARCEL NO. 092A-0623-042-010

**ATTACHMENT 3**  
**TRANSFER DOCUMENT**

**California Regional Water Quality Control Board  
San Francisco Bay Region**

**Attachment 3 to Resolution No. R2-2002-0106  
Written Instrument of Release and Transfer Document**

\_\_\_\_\_ [name of owner, purchaser, lender, lessee, or occupant]  
(hereinafter "Released Party"), by signing below verifies and warrants as follows:

Released Party has read the Mutual Release and Covenant Not to Sue ("Mutual Release") document, for the 36565 Newark Boulevard property in the City of Hayward, County of Alameda, California as identified in Attachment 2 to Resolution No. R2-2002-0106.

Released Party understands and agrees that the Mutual Release contains a release by the Regional Water Quality Control Board ("Regional Board") and a covenant not to bring or support any action or order against subsequent purchasers, tenants, lenders, and occupants of all or a portion of the Property (as defined in the Mutual Release), including their directors, officers, employees, partners, affiliates, members, agents, successors, and assigns, related to the Known Conditions (as defined in the Mutual Release), including contamination at, under, or originating from the Property (as defined in the Mutual Release).

Released Party understands and agrees that it may enjoy the benefits of the Mutual Release only if it releases and covenants not to sue the Regional Board as set forth in the Mutual Release, and that by executing this Release, Released Party releases and covenants not to sue the Regional Board in accordance with the terms of the Mutual Release.

Released Party understands and agrees that its right to rely on the benefits of the Mutual Release is subject to and conditioned on its own, but only its own, compliance with its obligations under the terms of the Mutual Release.

Released part accepts and agrees to abide by all provisions of the Mutual Release.

This Release and Transfer Document shall be effective upon execution by the Released Party. As soon as practical after execution, Released Party agrees to mail a copy of the executed Release to: Executive Officer, Regional Water Quality Control Board, San Francisco Bay Region (address as of October 2002: The Harris Office Building, 1515 Clay Street, Suite 1400, Oakland, CA 94612).

\_\_\_\_\_  
Authorized Signature (Released Party)

\_\_\_\_\_  
Date

Name/Title: \_\_\_\_\_

Company Name  
And Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_